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| APPLICATION NO. | FILING DATE | FIRST NAMED INVENTOR | ATTORNEY DOCKET NO. | CONFIRMATION NO. |
|-----------------|-------------|----------------------|---------------------|------------------|
|-----------------|-------------|----------------------|---------------------|------------------|

10/800,578

03/15/2004

Marc Tillis

LL11.12-0089

1692

54704 7590 04/15/2008
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EXAMINER

WEIER, ANTHONY J

ART UNIT

PAPER NUMBER

1794

MAIL DATE

DELIVERY MODE

04/15/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

| | | | |
|------------------------------|--------------------------------------|-------------------------------------|--|
| Office Action Summary | Application No. 10/800,578 | Applicant(s) TILLIS, MARC | |
| | Examiner Anthony Weier | Art Unit 1794 | |

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 1/2/08.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-6,9,10,13-18,22-29,34-36,42-44,46,50-53,55 and 59 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-6,9,10,13-18,22-29,34-36,42-44,46,50-53,55 and 59 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Claim Rejections - 35 USC § 112, 1st paragraph

1. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

Claims 1-6, 9, 10, 13-18, 22-29, 34-36, 42-44, 46, 50-53, 55, and 59 are rejected under 35 U.S.C. 112, first paragraph, as failing to comply with the written description requirement. The claim(s) contains subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention. The original specification does not provide support for the terminology "major" in regard to the egg component. Although there is reference to particular amounts of egg in the final product, there is no indication that the term "major" is defined by these particular amounts. In effect, the term "major" can also refer to significance of a particular ingredient or amounts, and the original specification does not provide definite separate for such terminology. Also, the term "bite size pieces" does not appear to be supported by the original specification.

This is a new matter rejection.

Claim Rejections - 35 USC § 112, 2nd paragraph

2. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 1-6, 9, 10, 13-18, 22-29, 34-36, 42-44, 46, 50-53, 55, and 59 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In each of the independent claims, the terminology "a major portion" is indefinite in that it is not clear whether same refers specifically to amounts or significance of the egg ingredient. Moreover, with respect to amounts, it is not clear what range of amounts are compassed by such terminology.

Also in each independent claim, it is not clear as to the scope encompassed by the terminology "bite size pieces."

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

4. Claims 1-6, 9, 10, 17, 22-26, 28, 30, 43, 44, 50, 51, 53, and 59 are rejected under 35 U.S.C. 102(e) as being anticipated by Pfeiffer.

Pfeiffer discloses a process of preparing a food wherein an beaten eggs (inherently fluid and flowable), comminuted bread (i.e. water-absorbent thickener and employed in less than 25% of the total weight, see paragraph 25), and pieces of a supplemental food (bacon, pork, etc.) are mixed together and formed into a patty wherein it is expected that the comminuted

bread would aid in binding and maintaining the distribution of pieces of the supplemental food throughout the food. It is expected that the bread ingredient would possess the particular absorbing ability as set forth, for example, in claim 10 as such degree of absorbance is modest. Upon cooking of the food, the egg component will coagulate. In addition, Pfeiffer discloses breading the food product and frying same (e.g. paragraph 12).

It should be noted that egg is a major portion of the product of Pfeiffer in that same is employed in all of the embodiments of such food and contributes significantly to the homogeneity of the mixed ingredients during processing.

Claim 2 further calls for mixing in a certain order the various ingredients. However, it is not seen where the order of mixing same would necessarily result in an unexpected result. It would have been obvious to one having ordinary skill in the art at the time of the invention to have mixed the ingredients of the Pfeiffer food product in any order to achieve the same product.

The claims further call for the step of cutting the coagulated product prior to breading and frying same and that the coagulated product is cut into bite-sized pieces. It is notoriously well known to prepare breaded and fried foods in a wide variety of sizes. Absent a showing of unexpected results, it would have been further obvious to have included the step of cutting the product into pieces prior to breading so as to facility a more uniform outer coating (as opposed to cutting following breading and frying). Such is seen as nothing more than a preference regarding the particular aesthetics desired in the final product. Likewise, the size of the cut is not seen as a patentable distinction but, rather, a matter of preference depending on, for

example, again, the aesthetics desired for the final product or the particular size appropriate for the consumer (e.g. a smaller sized portion would be more appropriate for a child consumer).

5. Claims 15, 16, 34, 35, and 36 are rejected under 35 U.S.C. 103(a) as being unpatentable over Pfeiffer taken together with AllRecipe.

The claims further call for the inclusion of a liquid dairy component. However, it is well known to include milk and a few other different ingredients in the preparation of egg and pork containing patties as taught, for example, by AllRecipe to provide a patty with an added twist (i.e. sweet and sour pour patties) . Absent a showing of unexpected results, it would have been obvious to one having ordinary skill in the art at the time of the invention to have modified the patty of Pfeiffer to include other ingredients, including milk, to give such alternative patty product as a matter of preference.

6. Claims 13, 14, 18, 27, 29, 46, 52, and 55 are rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied in either one of paragraphs 4 or 5 and further in view of Ullrich et al.

The claims further call for the presence of a stabilizing agent that imparts freeze-thaw stability to the food product. Ullrich et al teaches egg containing patties having freeze-thaw stability due to the presence of, for example, xanthan gum (paragraph 17). It would have been obvious to one having ordinary skill in the art at the time of the invention to have included such stabilizing agent in the product of Pfeiffer to impart a freeze-thaw stability to same. The claims further call for the particular amount of ingredients used. However, such determination would have been well within the purview of a skilled artisan, and, absent a showing of unexpected results, it would have been further obvious to have arrived at

such amounts through routine experimental optimization.

Response to Arguments

7. Applicant's arguments and amendments filed 1/8/08 have been fully considered but are not persuasive except with regard to previous rejections relating to Frattinger et al, JP 63-216455, JP 2001-45959, and JP 402069166 which have been withdrawn.

All remaining arguments have been addressed in view of the rejections as set forth above.

Conclusion

8. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Anthony Weier whose telephone number is 571-272-1409. The examiner can normally be reached on Tuesday-Friday.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on 571-272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Anthony Weier
Primary Examiner
Art Unit 1761

/Anthony Weier/
Primary Examiner, Art Unit 1794

Anthony Weier
April 10, 2008

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